SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1361

THE TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioner,

vs.

CECIL WYATT, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

Brief for Respondent in Opposition

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

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Jurisdiction

The decision of the Supreme Court of Nevada which is sought to be reviewed is based upon an adequate and independent state ground. No question or claim within the purview of 28 U.S.C., Section 1257(3), has been properly raised by petitioner, and this Court is without jurisdiction to review the decision of the state court.

Questions Presented

1. Whether any federal question subject to review by this Court arises out of the affirmance by the highest court of a state of a judgment in a civil action which was tried before a jury in a lower state court, where the highest state court, in affirming such judgment, based its decision upon the conclusion that the evidence was sufficient to support the jury's verdict and that none of the trial judge's instructions were erroneous or in violation of a state constitutional provision forbidding jury instructions upon "matters of fact."

2. Whether any federal question subject to review by this Court arises out of the determination by the highest court of a state, on a hypothetical basis, that even if a jury instruction in a civil action did violate a state constitutional prohibition against instructing juries upon "matters of fact," the error was harmless and did not result in a miscarriage of justice in the particular case at hand when considered in the light of the whole record and the normal reasoning processes of jurors.

3. Whether the due process and equal protection of law provisions of the Fourteenth Amendment to the United States Constitution compel the State of Nevada to apply a rigid and inflexible harmless-error rule in civil actions, under which rule any violation of the provision of the Nevada State Constitution, Article VI, Section 12, which forbids jury instructions "in respect to matters of fact," would auto-

matically and invariably constitute harmful and prejudicial error, regardless of the facts and circumstances of the particular case.

Statement of the Case

This is a civil action for personal injuries which was tried in Washoe County, Nevada, and which resulted in a unanimous jury verdict and judgment on April 20, 1967, in favor of the Plaintiff, Cecil Wyatt, Jr., in the amount of $500,000.00. The accident which gave rise to this action occurred on July 23, 1964, while Plaintiff, then 24 years of age, was water skiing behind a boat on Lake Lahontan, which was an artificial lake created by the construction of Lahontan Dam. The Defendant, The Truckee-Carson Irrigation District, a private corporation, owned and controlled Lake Lahontan and the level of the water therein. The primary function of the lake was to store and supply water for irrigation purposes, but the Defendant also allowed the public, for a fee, to use the lake for boating, water skiing and other recreational purposes.

The water of the lake was murky, and prior to the accident the Defendant was aware that the lake contained numerous latent hazards in the form of floating debris and submerged tree stumps. The Plaintiff, an accomplished water skier, crossed over the wake of the boat and, while approximately fifty feet from the shore, in an area which appeared to him and his companions to be perfectly safe for

skiing, he struck some solid object. His ski stopped abruptly, and he was catapulted forward head first into the water like an arrow shot from a bow. He struck his head with such force that his neck was broken and his spinal cord severed, resulting in permanent and irreversible quadriplegic paralysis. In the area where the accident occurred the water was so murky that it was impossible to see more than a foot below the surface.

The plaintiff was subsequently taken to a hospital, where it was observed that there were no sand burns or any other marks on his body to indicate that he had fallen on the beach. While in a state of shock and heavily sedated, he apparently talked to a physician, a nurse and a hospital clerk. These individuals were called as witnesses for the Defendant, and each testified, in a vague and uncertain manner, that the Plaintiff had allegedly stated that the accident occurred when his water skis "hung up on the sand" or when he "ran up on the beach." The Plaintiff had no recollection of making any such statement.

At that time neither the Plaintiff nor his two companions knew exactly what the Plaintiff had struck. It was later learned, however, that there was a submerged tree stump in the immediate vicinity of the Plaintiff's fall. This fact was established by the testimony of several witnesses, including one of the Defendent's employees, and by photographic evidence.

The trial judge instructed the jurors, *inter alia*, that it was their exclusive function to determine the credibility of the witnesses and to find the facts in the case. The jurors were also instructed that the trial judge had not expressed, nor had he intended to express or to intimate, any opinion as to the credibility of witnesses or as to the inferences to be drawn from the evidence.

On appeal, the Supreme Court of the State of Nevada determined that neither the jury nor the trial judge had erred, and it affirmed the judgment. On an *arguendo* basis, it also stated that even if the trial judge had erred in instructing that evidence of the oral admission of a party, other than his own testimony at the trial, ought to be viewed with caution, any such error was harmless and non-prejudicial when considered in the light of the entire record and the normal reasoning processes of jurors. The rule of harmless error which was thus hypothetically applied is not a new rule in Nevada, but one which has been recognized and applied in several prior decisions of the Nevada Supreme Court. Furthermore, Rule 61 of the Nevada Rules of Civil Procedure, which the Nevada Supreme Court held to be pertinent, provides in substance that at every stage of the proceeding the court must disregard any error or defect which did not affect the substantial rights of the parties.

ARGUMENT

I.

The Decision of the Nevada Supreme Court Does Not Present Any Federal Question.

A. The Nevada Supreme Court did not determine that the challenged instruction relating to evidence of the oral admissions of a party was erroneous or in violation of any provision of the Nevada State Constitution or of the Nevada Statutes.

Petitioner has erroneously assumed that the trial judge's instruction concerning the oral admissions of a party violated the Constitution of the State of Nevada. The Supreme Court of the State of Nevada did not so hold. On the contrary, it pointed out that instructions cautioning the jury to consider a witness's testimony carefully were often given in Nevada and that the giving of such instruction had not been regarded as error.

In *State v. Jukich*, 49 Nev. 217, 242 P. 590, 598 (1926), the trial Court had instructed the jury that although evidence of drunkenness could be considered in a homicide case for the purpose of determining the degree of the crime, "such evidence must be received with great caution." In approving this instruction, the Nevada Supreme Court stated:

"When evidence is of such character that its weight may be easily misjudged it is proper for the court to advise that it should be received with great caution."

B. The Nevada Supreme Court was clearly justified in concluding that the challenged instruction was not a charge upon "matters of fact."

There is a clear distinction between the probative force of an admission and the probative force of the evidence introduced to establish that an admission was in fact made. (31A C.J.S., Evidence, Section 382, pages 930-931). It has been widely recognized that evidence of oral admissions should be received with caution and subjected to careful scrutiny. (Jones on Evidence (Fifth Ed.), Section 396, pages 737-738; 4 Wigmore on Evidence (Third Ed.), Section 1056, page 17). To furnish generalized guidance to a jury concerning the manner in which it should undertake its exclusive fact-finding function is not to charge the jury upon "matters of fact." The instruction challenged by petitioner did not in any way invade the province of the jury. It was neither argumentative nor disparaging in nature, and it merely called to the attention of the jury a sound rule of judicial counsel which has been distilled from centuries of legal experience.

C. No federal question arises from the decision of the Nevada Supreme Court.

The Nevada Supreme Court has not held that there was any violation of the Nevada State Constitution and its hypothetical application of the rule of harmless error was not the basis of its decision. The decision rests upon an adequate, independent state ground, and there is no federal question which is subject to review by this Court.

II

The Fourteenth Amendment to the United States Constituition Does Not Compel Any State to Adopt a Rigid and Inflexible Harmless Error Rule in Civil Actions.

A. The harmless error rule which has been hypothetically applied by the Nevada State Supreme Court is not a new rule in the State of Nevada.

Prior to the decision in the instant case, it was well settled in the State of Nevada that a judgment could not be reversed by reason of an errornous instruction unless it appeared upon a consideration of the entire proceedings that such error had so substantially affected the rights of the complaining party that a different result would have been probable but for the erroneous instruction.

Boyd v. Pernicano, 79 Nev. 356, 385 P. 2d 342 (1963);

Pfister v. Shelton, 69 Nev. 309, 250 P. 2d 239 (1952).

In the present case, even the dissenting justices have agreed that this is the established test for prejudicial error in the State of Nevada. Petitioner has been unable to cite any authorities to support its assertion that the Supreme Court of Nevada has adopted a new rule of harmless error. Furthermore, even if it had done so, this would not give rise to any federal question subject to review by this Court. *Patterson v. Colorado*, 205 U.S. 454, 461 (1907).

B. Even if the challenged instruction had been in violation of the Nevada State Constitution, the Fourteenth Amendment to the United States Constitution does not compel a state court to conclude that all state constitutional errors, regardless of the facts and circumstances, must always be deemed harmful.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court refused to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. On the contrary, it was held that even in a criminal case there may be some federal constitutional errors which in the setting of the particular case may be deemed harmless.

The Fourteenth Amendment does not draw to itself the provisions of state constitutions or state laws. *Buchalter v. New York*, 319 U.S. 427, 429-430 (1942). If a violation of a state constitutional provision has occurred in an action tried in a state court, the Fourteenth Amendment does not require the state court to conclude that such a violation is automatically and inevitably harmful error. Just as in the case of a violation of the federal constitution, the evaluation of the effect of any such error depends upon the factual and legal context in which it occurred.

Petitioner's contention that there are two aspects to the rule of harmless error is clearly fallacious. In every jurisdiction there is only one basic aspect to this rule. Error which affected substantial rights is harmful; error which did not affect substantial rights is harmless. Cf., *Helms v. United States*, (C.A. Tex., 1964) 340 F. 2d 15, *cert. denied*, 382 U.S. 814; 28 U.S.C., Section 2111. The important factor is not the nature of the error, but rather its effect upon the substantial rights of the complaining party. Whether or not an error is of constitutional dimension is not the controlling consideration. The critical question is whether or not a substantial right was adversely affected by the error, whether it was constitutional in nature or not.

In the case at hand the Nevada Supreme Court has correctly held that even if it be assumed that

the challenged instruction was in violation of a provision of the Nevada State Constitution, the giving of that instruction did not impair any substantial rights of Defendant.

Petitioner's reliance upon *San Jose Ranch Co. v. San Jose Land & Water Co.*, 126 Cal. 322, 58 P. 824 (1899) is misplaced. The error in that case consisted of the trial court's wrongful refusal to afford to the plaintiff an opportunity to present a full and complete record to the appellate court. This was clearly a substantial injury, since it deprived the plaintiff of his right to a complete appellate review. At the same time, however, the California Supreme Court pointed out that "courts are not created for the redress of ideal wrongs, and, therefore, when from the record we can see that the injury is not substantial it is not such a grievance as courts will redress." (*San Jose Ranch Co. v. San Jose Land & Water Co., supra*, 126 Cal. 322, 327, 58 P. 824, 826).

The judgment entered in this case is sound and fair. The jury's verdict was solidly supported by substantial evidence. The Nevada Supreme Court has found no error in the proceedings in the lower court, and it has also ruled that even if technical error did occur, it did not affect any substantial rights of the Defendant. There has been no violation of due process of law, nor any denial of equal protection of the law. There is no federal question subject to review by this Court

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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